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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR FEBRUARY.

According to a recent decision of the Supreme Court of Iowa, under Article 6 of the Constitution of the United States, which provides that the constitution, laws made in pursuance thereof, and federal treaties with foreign countries, shall be the supreme law of the land, notwithstanding anything in the constitution or laws of a state to the contrary, a federal treaty with a foreign country, conferring on its subjects, in spite of their being aliens, a qualified right to take lands in the United States by inheritance, under the laws here controlling its descent, must prevail over a state law prohibiting aliens from taking land by descent; and the fact that such a treaty removes from such aliens the disability to inherit imposed by a state statute, does not alter the laws of descent of a state so as to render it unconstitutional, as an infringement of the right of the state to control its internal policy: *Opel v. Shoup*, 69 N. W. Rep. 560.

Aliens,
Right of
Inheritance,
Conflict of
Laws,
Federal
Treaties and
State Laws

If a citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property, whether the disqualification be by common law or express statute: *Ware v. Hylton*, 3 Dall. 199, 1796; *Fairfax v. Hunter*, 7 Cranch, 603, 1813; *Chirac v. Chirac*, 2 Wheat. 259, 1817; *Orr v. Hodgson*, 4 Wheat. 453, 1819; *Society v. New Haven*, 8 Wheat. 464, 1823; *Hauenstein v. Lynham*, 100 U. S. 483, 1879; *Geofroy v. Riggs*, 133 U. S. 458, 1889, reversing 7 Mackey, (D. C.) 331, 1889; *People v. Gerke*, 5 Cal. 381,

1855; *Schultze v. Schultze*, 144 Ill. 290, 1893; and if the treaty is susceptible of two interpretations the more liberal is to be preferred: *Hauenstein v. Lynham*, 100 U. S. 483, 1879; *Schultze v. Schultze*, 144 Ill. 290, 1893. A statute imposing a succession tax, however, does not violate a treaty giving aliens the same rights of inheritance as citizens: *In re Stroble's Estate*, 39 N. Y. Suppl. 169, 1896; and a treaty providing that the citizens or subjects of a foreign country "shall have free access to the tribunals of justice in their litigious affairs on the same terms which are granted by the law and usages of the country to native citizens or subjects," does not preclude the United States from giving special rights of action to its own citizens in particular cases to the exclusion of some or all aliens: *Valk v. United States*, 29 Ct. of Cl. 62, 1894. "Moreover, the treaty, which will suspend or over-ride the statute of a state, must be a treaty between the United States and the government of the particular country of which the alien, claiming to be relieved of the disability imposed by the state law, is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of:" *Wunderle v. Wunderle*, 144 Ill. 40, 1893.

The fact that a law regulating inheritance by aliens may thus be rendered inoperative as to certain of those embraced within its terms does not make it a special statute, or a discrimination against those who are still affected by it, within the constitutional prohibition of such legislation: *Wunderle v. Wunderle*, 144 Ill. 40, 1893.

As long as the ancestor is still living, the alien heir has no rights: *Wunderle v. Wunderle*, 144 Ill. 40, 1893; but when once the title to land has vested, it cannot be divested by a repeal of the treaty: *Carneal v. Banks*, 10 Wheat. 181, 1825.

A statute making it a crime for a contractor with a municipal corporation to employ an alien as a laborer on public works, violates the treaty between the United States and Italy, which provides that resident Italians in the United States shall enjoy the same rights and privileges as are secured to our own citizens: *People v. Warren*, 34 N. Y. Suppl. 942, 1895.

The Supreme Judicial Court of Maine has lately rendered a most valuable decision with regard to the rights of an architect, specially employed, whose plans prove unavailable through an honest mistake of judgment on his part: *Coombs v. Beede*, 36 Atl. Rep. 104.

Architect,
Compensa-
tion,
Miscalcula-
tion

The court below charged that if the architect was expressly told that the cost of the house designed must not exceed a certain sum, he should either have made plans accordingly, or frankly told his employer that he could not do it, and have declined to do it, and that if he undertook the commission with that specific restriction, he could not recover any compensation, in case the plans called for a house of greater cost. But the Supreme Judicial Court granted a new trial on the ground that this instruction was erroneous, Peters, C. J., defining the rights and duties of the architect as follows:

"We must bear in mind that the plaintiff was not a contractor who had entered into an agreement to construct a house for the defendant, but was merely an agent of the defendant to assist him in building one. The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life."

The Supreme Court of Pennsylvania has recently declared the just and equitable rule, that a decree for perpetual disbarment of an attorney for attacking the judicial integrity of the court in a manner tending to influence the court in a decision should not be made when the attorney has previously been of good character, and assiduous in his practice, and is past middle life, and therefore is not likely to succeed in any other vocation; and imposed, in the case in hand, a disbarment for two years only, on condition of good behavior, as being sufficient punishment: *In re Smith*, 36 Atl. Rep. 134.

When a transaction made by an officer of a national bank with intent to defraud, is entered on a deposit slip, the entry of the contents of that slip upon the books of the bank, either by the officer personally, or by another under his direction, is the making of a "false entry," within Rev. Stat. U. S. § 5209: *Agnew v. United States*, 17 Sup. Ct. Rep. 235.

In a prosecution of a public officer for accepting a bribe to refrain from the execution of duties enjoined by statute, the defendant cannot raise the question of the constitutionality of the statute: *Newman v. People*, (Supreme Court of Colorado,) 47 Pac. Rep. 278.

According to a recent decision of the Court of Civil Appeals of Texas, which seems to be consonant with the other authorities on the subject, the mere fact that a train fails to stop the usual and reasonable time to enable passengers exercising ordinary diligence to get on and off does not constitute negligence as to a person who gets on to assist a passenger, and is injured in getting off after the train has started. He must give notice of his intention to alight before getting on: *International & G. N. R. R. Co. v. Satterwhite*, 38 S. W. Rep. 401.

The Supreme Judicial Court of Massachusetts, in *Coffin v. Dodge*, 45 N. E. Rep. 928, has lately held, that the liability of a stockholder of a foreign corporation under the statutes of the foreign state to a creditor of the corporation cannot be enforced in Massachusetts, when it is not alleged to be contractual, or to be so held by the courts of that state. This appears to be a weak evasion of responsibility. It was the business of the court to examine the statute itself, and, with or without evidence as to the construction put upon it by the courts of the foreign state, to construe it according to its own views. Further, one would naturally presume, from the relations of the stockholder and creditor to each other through the medium of the corporation, that such a statutory liability is contractual, rather than penal; and the defendant should establish the latter fact. The court should read the decision of the Privy Council of England in *Huntington v. Attrill*, [1893] A. C. 150, 1892, especially these sentences of Lord Watson's opinion: "Judicial decisions in the state where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The court appealed to must determine for itself in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal." The learned judge, having in mind the fact that courts were established to give relief to suitors, never seems to have dreamed of the way out of the dilemma adopted by the Massachusetts court,—that of refusing relief altogether, unless the plaintiff forces its hand.

The decision of the Privy Council was approved and adopted

**Conflict of
Laws,
Penal
Statutes,
Liability of
Stockholders
of a Corpora-
tion to
Creditors**

in *Huntington v. Attrill*, 146 U. S. 657, 1892; so that the weight of authority is overwhelmingly against the Massachusetts rule.

A statute of the territory of New Mexico provides that "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car, or train of cars, ... the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, engineer or driver shall be at the time such injury was committed, ... shall forfeit and pay for every person or passenger so dying the sum of \$5,000, which may be sued and recovered, first by the husband or wife of the deceased, second, if there be no husband or wife, ... then by the minor child or children of the deceased." The Supreme Court of Kansas, applying the principle that a penal statute will not be enforced by the courts of a foreign jurisdiction, has refused to enforce the liability created by this statute, since it is in part penal, and gives a right of action to persons other than the one who would be entitled to recover under the laws of that state in a similar case arising there: *Dale v. Atchinson, Topeka & Santa Fe R. R. Co.*, 47 Pac. Rep. 521.

The Supreme Court of the United States has recently declared, in consonance with its prior rulings, that a suit to enjoin state officers from seizing private property under authority of an unconstitutional statute is not a suit against the State: *Scott v. Donald*, 17 Sup. Ct. Rep. 262; and that a suit for damages against state officers, who have seized and carried away private property under color of an unconstitutional statute, is not a suit against the state; within the prohibition of the Eleventh Amendment: *Scott v. Donald*, 17 Sup. Ct. Rep. 265. From this latter decision Mr. Justice Brown dissented.

**Recovery for
Death
Caused by
Negligence**

**Constitutional
Law,
Actions
Against
State,
Proceedings
Against
State
Officers**

The same court, following the current of authority, has decided that the act of Missouri of March 31, 1887, which makes railroad companies liable for property destroyed by fire communicated from their locomotives, and gives them an insurable interest in the property along their roads, is not in excess of the powers of the legislature; and that it is not unconstitutional, either as depriving the companies of property without due process of law, or as impairing the obligation of a contract between the companies and the state, by which they are impliedly permitted to use fire in the operation of their roads, or as denying to the companies the equal protection of the laws: *St. Louis & S. F. Ry. Co. v. Mathews*, 17 Sup. Ct. Rep. 243.

**Railroad
Companies,
Liability for
Destruction
of Property
by Fire**

The Supreme Court of South Dakota, in *Skinner v. Holt*, 69 N. W. Rep. 595, has lately held unconstitutional two statutes of that state, which sought to render a life insurance policy exempt from the claims of creditors. The first of these was the act of 1890, c. 51, § 21, which provided that a "policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities from any of his or her debts." This was held to violate the following provision of the state constitution: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sales a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws," on the ground that "a law which, without any limitation as to value, specifies a kind of property that a debtor, solvent or insolvent, may acquire, by investing therein or diverting thereto his entire estate, to the exclusion of *bona fide* creditors, is neither 'wholesome' in character nor

**Exemption
Laws**

'reasonable' as to amount, and is by far too generous to be just."

The other act was that of 1895, c. 89, which provided that "the avails of any policy or policies of insurance heretofore or hereafter issued upon the life of any person, and payable upon the death of such person to the order, assigns, estate, executors, or administrators of the insured, and not assigned to any other person, shall, if the insured in such policy at the time of death reside or resided in this state, and leave or left surviving a widow or husband or any minor child, to an amount not exceeding in the aggregate the sum of five thousand dollars, inure to the separate use of such widow or husband or minor child or children or both, as the case may be, independently of the creditors of such deceased, and to such amount shall not in any action or proceeding legal or equitable be subject to the payment of any debt of such decedent." This was held to contravene Article 1, § 10, of the Constitution of the United States, which enacts that no state shall pass any law impairing the obligation of contracts, and with Article 6, § 12, of the constitution of South Dakota, which contains substantially the same provision.

The Supreme Court of Pennsylvania, in a case of great local interest, *Smith v. Times Pub. Co.*, 36 Atl. Rep. 296, has succeeded in overturning all established precedents as to the functions of an appellate court in regard to the question of damages. In the first place, it construes an act passed May 20, 1891, P. L. 101, which provided that "the Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment, order, or decree appealed from, and to enter such judgment as the Supreme Court may deem proper and just, without returning the record for amendment or modification to the court below, and may order a verdict and judgment to be set aside and a new trial had," as giving it the power to reverse a verdict on the sole ground that the damages are excessive; and then upholds the act thus construed, as not in violation of the constitution of Pennsylvania, Art. 1, § 6, declaring

**Jury Trial,
Excessive
Damages**

that "trial by jury shall be as heretofore." See note in this issue.

In *State v. Bockstruck*, 38 S. W. Rep, 317, the Supreme Court of Missouri, Division No. 2, held constitutional the act of that state of April 19, 1895, which prohibits the manufacture or sale of any substitute for butter so colored as to resemble butter, as being within the police power of the state; and that the fact that portions of the statute were unconstitutional, did not render it also unconstitutional as to the other portions. The court further held that the provision of § 8 of the act, that "whoever shall have possession or control of any imitation butter, or any substance designed to be used as a substitute for butter, contrary to the provisions of this act, shall be construed to have possession of property with intent to use it, as a means of committing a public offence," did not contravene Article 4, § 53, of the constitution of Missouri, which prohibits the passage of any special law changing the rules of evidence.

When a majority of the voters who vote upon a constitutional amendment submitted to the people of the state at a general election, vote in favor of the adoption of the amendment, the same is ratified, though the votes cast in its favor are not a majority of the votes cast for state officers at the general election. A majority of those who actually vote thereon is all that is required, in the absence of express provision: *Green v. State Board of Canvassers*, (Supreme Court of Idaho,) 47 Pac. Rep. 259.

Judge Stirling, of the Chancery Division of England, has lately ruled that the principle that a publishing agreement between an author and a publisher, or a firm of publishers, is personal to the individuals entering into it, and that the benefit of such a contract is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company: *Griffith v. Tower Pub. Co., Ltd.*, [1897] 1 Ch. 21.

In a recent case in the Circuit Court for the Northern District

of Illinois, N. D., it appeared that the Distilling and Cattle-Feeding Company, which manufactured and sold spirits, etc., issued to the purchasers of its goods what were called "rebate vouchers," by which, for the purpose of securing the continuous patronage of the customer, it promised to pay him, in six months, a sum equal to five cents per gallon of the goods purchased by him. These vouchers provided that they should be valid and payable "only on condition" that the purchaser and his successors should, during the six months specified, have bought all his supply of such goods from the Distilling and Cattle-Feeding Company, or certain persons named as its distributing agents. The company having been placed in the hands of a receiver, certain of these vouchers were presented to him for allowance by persons who claimed to be equitable assignees from the persons to whom they were issued. It further appeared that the condition as to continued purchases from the company had not been complied with. Upon these facts, it was held that the vouchers did not create a present obligation to pay the rebate, subject to be defeated by a breach of the condition, but that the obligation would arise only on performance of the condition, and that, therefore, even if the condition should be held illegal, there would be no obligation without performance; that it did not appear from the contract that the rebate was a sum paid in excess of the price of the goods sold, and that it could not be recovered back as money of the customer paid on an illegal consideration, and held by the company; that no engagement could be implied that the company's products should be offered during the six months at reasonable prices, or without further rebate vouchers, conditioned on still further patronage; and that the vouchers were not illegal or against public policy: *Olmstead v. Distilling & Cattle-Feeding Co.*, 77 Fed. Rep. 265.

A contract for the sale of the fixtures of a post office, by which the seller, who was then postmaster, agreed to resign, and to use his influence to secure the appointment of the purchaser to the office, has been lately declared by the Supreme Court of Arkansas to be

**Illegal
Consideration,
Rebate
Vouchers**

**Public Policy,
Sale of
Public Office**

void, as against public policy: *Edwards v. Randle*, 38 S. W. Rep. 343.

The court also held that money paid under the contract could not be recovered on the refusal of the seller to perform.

In the opinion of the Supreme Court of California, competing for premiums offered by an association on horse races is not competing for bets and wagers, and the payment of entrance fees to the association for the privilege of competing in a race for which a premium is offered does not make the transaction a wager between the competitors; and accordingly, an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses, and to divide the same equally, is valid: *Hankins v. Ottinger*, 47 Pac. Rep. 254.

The Court of Appeal for Ireland has recently held, affirming the judgment of the Queen's Bench Division, that, as far as the right of contribution between co-debtors is concerned, the statute of limitations begins to run from the date at which one of them is damaged by being compelled to pay more than his just share of the joint debt; and that accordingly, when one of several co-principals to a note has made payments thereon so as to toll the statute, and being consequently liable to pay the whole note, does pay it, he can recover against his co-principals, though the creditor is barred by the statute from recovering from them: *Gardner v. Brooke*, [1897] 1 I. R. 6.

In *Ernest v. Loma Gold Mines, Ltd.*, [1897] 1 Ch. 1, the Court of Appeal of England has affirmed the decision of Justice Chitty, [1896] 2 Ch. 572, (see 35 AM. L. REG. N. S. 775,) that on a *viva voce* vote, at a meeting of a corporation, the vote of each person who holds a proxy must be counted as a single vote, and not as a vote for each person for whom he holds a proxy; and that when a notice calling a special meeting was accompanied by a circular from the secretary and directors with a proxy attached, asking for the return of the proxy in support of the resolution, the date of the meeting

**Wagers,
Premiums on
Horse Races**

**Contribution,
Co-Sureties,
Limitation**

**Corporations,
Meetings,
Voting,
Proxies,
Viva Voce
Vote**

being left blank in the proxy by a printer's error, and several of the members executed and returned their proxies duly stamped without filling up the blanks, which were filled up by the secretary before the proxies were lodged with the corporation, the proxies were valid.

In an action against the directors of a corporation for paying dividends out of capital, the directors may show, in defence, that certain notes which, if they had been properly classed as losses, would have left the corporation without a surplus on the day the dividend was declared, were afterwards paid in full, so that no actual loss was sustained by the payment of the dividend: *Dykman v. Keeney*, (Supreme Court of New York, Appellate Division, Second Department,) 42 N. Y. Suppl. 488.

**Illegal
Dividends,
Liability of
Directors**

In the same case, it appeared that, before the declaration of the dividend, the defendants, after consulting the superintendent of the banking department, delivered to the bank their individual notes, together with a memorandum, reciting that the notes were given to remove a doubt as to the character of some of the receivables of the bank, and to make the bank unquestionably solvent. After the failure of the bank these notes were paid to the receiver. Under these circumstances it was held that the money so paid, in excess of the amount necessary to make good the impairment of capital existing when the notes were given, should be applied on the liability of the defendants arising out of the declaration of the dividend.

When a person who has committed a criminal offense fraudulently procures himself to be prosecuted and convicted before a justice of the peace, or other tribunal having jurisdiction thereof, which imposes an insignificant penalty, and the purpose of the proceedings is to avoid a real prosecution and punishment for the offense committed by him, such conviction is not a bar to a prosecution brought in good faith, where the state is a party in fact as well as in name. *State v. Smith*, (Supreme Court of Kansas,) 47 Pac. Rep. 541.

**Criminal Law,
Former
Conviction**

The Supreme Court of Appeals of Virginia has recently held, that in passing upon the right of nominees for public office to appear upon election ballots, the courts will recognize the right of the nominating convention to judge of the election, qualifications and returns of its delegates, and will not go back of its action to inquire into the right or title of delegates admitted by it to act as such: *Marcum v. Ballot Comrs.*, 26 S. E. Rep. 281.

**Elections,
Party
Conventions,
Admission of
Delegates,
Review
by Court**

The Act of New York of 1896, c. 909, § 56, provides that "If there be a division within a party, and two or more factions claim the same, or substantially the same device or name, the officer aforesaid [the secretary of state] shall decide between such conflicting claims, giving preference of device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities; and if the other faction or factions shall present no other device or party name, the said officer shall select a different device and party name for each such other faction, which shall be used upon the ballots to distinguish its ticket. If two or more conventions are called by different authorities, each claiming to represent the same party for that purpose, the said officer shall select a suitable device and party name to distinguish the candidates of one faction from those of the other, and the ballots shall be printed accordingly." In *People v. Roosevelt*, 45 N. E. Rep. 840, the Court of Appeals of New York held, affirming 41 N. Y. Suppl. 572, that this section applied not merely to factions within a party, but also to a contest between two or more conventions, each claiming to regularly represent a political party. (See 36 AM. L. REG. N. S. 132.)

**Faction of
Party,
Rival
Conventions,
Description on
Ballot**

In *State v. Lesueur*, (Supreme Court of Missouri,) 38 S. W. Rep. 325, a petition of nomination of "Silver party" candidates, which called for presidential electors who "will appear on the Democratic ticket," was signed by a number of voters. Subsequently five

**Nomination
by Petition,
Signers**

of the Democratic electors resigned, and their places were filled by nominees of the Populist party, and a new Silver party petition was then prepared, which contained the names of all the Democratic electors, including the fusion candidates. To this petition was attached the signatures of the former petition, which had been cut therefrom. It was held that the names thus attached could not be considered in ascertaining whether the new petition had the requisite number of signers.

When the secretary of state has transmitted to the county officers the form of ballot to be used at an approaching election, immediately upon the expiration of the time allowed for correcting certificates of nomination, he will not be compelled to instruct the county officers to omit from the ticket the name of a candidate who withdrew after the form of ballot was thus transmitted, if no nomination has been made to fill the vacancy: *State v. Taylor*, (Supreme Court of Ohio,) 45 N. E. Rep. 715.

Much to the surprise of any one who has followed the decisions of that body, the Supreme Court of Pennsylvania has lately decided that a policeman on duty, who, on a rainy night, attempts to remove with his mace a broken wire hanging from a pole in a street on his beat, is not necessarily chargeable with contributory negligence, though he knows that the wire is charged with electricity: *Dillon v. Allegheny County Light Co.*, 36 Atl. Rep. 164.

The Supreme Court of Appeals of West Virginia following the now well settled rule that equity has jurisdiction, by injunction, to prevent acts which will result in irreparable injury, has recently held that it will interfere in such a case, even though there is a controversy as to title between the parties, and having once acquired jurisdiction on this ground, will go on to give full relief, though in so doing it becomes necessary to decide between two adverse titles: *Bettman v. Harness*, 26 S. E. Rep. 271. It also held that the abstraction of petroleum oil or gas, they being part of the land, is an irreparable injury, and will be enjoined.

Under constitutional provisions, Const. Nev. § 17, that if, during a vacancy in the office of governor, the lieutenant-governor die or become incapable of performing the duties of the office, the president *pro tempore* of the senate shall act as governor till the vacancy is filled, and (§ 18) that in case of a vacancy in the office of governor, the powers and duties of that office shall devolve on the lieutenant-governor; a vacancy in the office of governor, creates no vacancy in the office of lieutenant-governor, and one elected to that office before expiration of the term for which the last elected lieutenant-governor was chosen has no claim to that office: *State v. Sadler*, (Supreme Court of Nevada,) 47 Pac. Rep. 450.

**Governor,
Lieutenant-
Governor,
Vacancy**

The Supreme Court of New Hampshire has recently decided, that under the married women's property acts, and the other enabling statutes which have removed the wife's disabilities, she may now, after her abandonment by her husband, acquire a separate domicile in another state; and on her death her estate will be administered under the laws of the new domicile: *Shute v. Sargent*, 36 Atl. Rep. 282.

**Husband and
Wife,
Domicile**

In the case in hand, the husband, who was domiciled in Massachusetts, had expressed his assent to his wife's will in writing on the back, as required by the statutes of that state, while they were living together as husband and wife. After the abandonment, the wife became domiciled in New Hampshire, whose laws do not recognize the binding nature of such an assent, and the court decided that it was inoperative, and that the husband took his share of her estate under the distribution law of New Hampshire.

In *Jack v. Kintz*, 177 Pa. 571, the Supreme Court of Pennsylvania held that the married women's acts do not remove the burden that rests on her of proving title to the property she claims against her husband's creditors; and that when the conveyance to her is from her parents, she must, in a contest with her husband's

**Property
Taken in
Wife's Name**

creditors, prove that she paid for it with her own money, or that it was a gift to her.

This case has excited considerable comment; but it is really no more than a repetition of the generally acknowledged rule, that the married women's acts only remove the disabilities of coverture as to the possession and control of property, and do not affect its other incidents. In this case, the bone of contention was not the wife's possession of the property but the manner in which she acquired it.

An association that contracts with its members, in consideration of the payment of a specified annual sum, to repair bicycles in case of accident, and to replace those destroyed by accident or stolen, but not to pay any money, is not an insurance company, which must be chartered under the act relating to such companies, but may lawfully do business under the clause of the general corporation act, which permits incorporations for "the maintenance of a society for . . . protective purposes to its members from funds collected therein:" *Commonwealth v. Provident Bicycle Assn.*, (Supreme Court of Pennsylvania,) 36 Atl. Rep. 197.

The "Lloyds" insurance policies, which have had some little vogue for years past, and been vigorously denounced by the regular companies, have been recently passed upon by Judge Spring, of the Supreme Court of New York, at Trial Term for Erie County. He holds (1) That the stipulations in a Lloyds policy that no action to enforce its provisions shall be brought except against one of the underwriters, who is designated to represent all the others, and that they will abide by the result of that action, is valid, as its enforcement does not oust the jurisdiction of the courts, but only prevents a multiplicity of suits, and the action thus provided for is against one of the parties to the contract, and not a mere agent or attorney; (2) That such a stipulation precludes the bringing of separate actions on the policy against the several underwriters, but does not prevent proceeding against them to enforce a judgment obtained in the

**Insurance,
What is not an
Insurance
Company**

**Lloyds Policy,
Validity,
Suits Upon**

action prescribed; and (3) That a limitation in a Lloyds policy that action therein must be answered within twelve months after loss refers only to the action to establish the claim, not to proceedings against the various underwriters to enforce a judgment: *Lawrence v. Schaefer*, 42 N. Y. Suppl. 992.

In *Roberts v. Security Co., Ltd.*, [1897] 1 Q. B. 111, a proposal for an insurance of goods against loss by burglary was made by the plaintiff to the defendant company on December 14, 1895. On December 27, 1895, at a meeting of the directors of the company, the seal of the company was affixed to a policy in conformity with the proposal, and this policy was signed by two of the directors and their secretary. It recited that a premium had been paid for insurance against loss by burglary from December 14, 1895, to January 1, 1897, and purported to insure the plaintiff's goods accordingly; and also contained a provision that no insurance by way of renewal or otherwise should be held to have been effected until the premium due thereon should have been paid. Upon the night of December 26, or early in the morning of December 27, 1895, a loss of goods included in the policy took place by burglary. The policy remained in the hands of the company, and nothing was paid by way of premium. Under these circumstances the Court of Appeal ruled that the policy constituted a completed contract of insurance, that the condition for prepayment of the premium was waived by the defendants by the recital of its payment; and that the policy had therefore attached.

When a judge, after the jury has retired, goes to the door of the jury room at the request of that body, and returns and informs counsel that the jury, through its foreman, had requested a repetition of certain instructions, his acts constitute such misconduct as will justify a reversal of a conviction: *State v. Wroth*, (Supreme Court of Washington,) 47 Pac. Rep. 106.

The Court of Appeals of Colorado has recently held, that when a tenant, during the term, and at his own expense, lays a tile floor in the demised building, he may, before the expiration of the term, remove the tiling, and restore the building to its original condition : *Ross v. Campbell*, 47 Pac. Rep. 465.

The Supreme Court of Nebraska has very wisely cut loose from the stringent rule of *Paradine v. Jane*, Aleyn, 26, which has been more or less slavishly followed up to the present day by all the courts of English speaking countries, and declares, in accord with *Whitaker v. Hawley*, 25 Kans. 674, 1881, that " we reach the conclusion that the common law rule of construction under consideration is not in force in this state, and formulate the rule as follows : Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction : " *Wattles v. South Omaha Ice & Coal Co.*, 69 N. W. Rep. 785. Post, C. J., and Irvine and Ryan, CC., dissented.

A letter from an elector of a state to the governor, in reference to the character and qualifications of an applicant to the governor for appointment as sheriff of the county in which the said elector resides, is not an absolutely privileged publication, but is only qualifiedly or conditionally privileged. The publisher of such a letter cannot, under the guise of such a communication, falsely and maliciously traduce and slander the moral character of the applicant ; and if he does so, he will be liable to an action therefor. But, on the other hand, the applicant cannot recover damages for any statements made in such publication, unless they were both false and malicious ; and accordingly, though the alleged libelous matter cannot be shown by the publisher to be true, yet, if there was reasonable ground for him to suppose that it was true, and it was published by him in good faith, under an

**Libel,
Privileged
Communication,
Letter to
Governor**

**Landlord and
Tenant,
Fixtures,
Removal**

**Lease,
Covenant to
Repair,
Destruction of
Buildings by
Fire,
Apportion-
ment of Rent**

honest belief that it was true both in assertions of fact and in comment thereon, and was published with the motive of benefiting the public welfare, without any private personal malice towards the plaintiff, the publisher will not be liable in damages: *Coogler v. Rhodes*, (Supreme Court of Florida,) 21 So. Rep. 109.

The Supreme Court of New York, Appellate Division, Third Department, held, in a recent opinion, that the discharge on *habeas corpus* of a person committed to await the action of the grand jury is not such a termination of the criminal proceedings, as will ground an action for malicious prosecution; and that the fact that up to the time of the trial of an action for malicious prosecution, begun two days after the plaintiff had been discharged on *habeas corpus* from a commitment to await the action of the grand jury, no further steps were taken in the criminal proceedings, does not show that those proceedings had been finally disposed of: *Hinds v. Parker*, 42 N. Y. Suppl. 955.

An employe of an electric light company, who is sent to trim lamps at a time when the wire connected with the lamps is usually "dead," and who knows that lamps are never trimmed while on "live" wires, has a right to assume that the wires will not become alive through the negligence of the company while he is engaged in trimming them: *Harroun v. Brush Electric Light Co.*, (Supreme Court of New York, Appellate Division, Fourth Department,) 42 N. Y. Suppl. 716.

In *Hitchcock v. Nixon*, (Supreme Court of Washington,) 47 Pac. Rep. 412, land on which there were two mortgages had been conveyed by the mortgagor to the first mortgagee, who also mortgaged it. At the time of the execution of the latter mortgage most, if not all of the debt secured by the first mortgage was paid, and the balance if any was paid afterwards. Under these circumstances, it was held that the doctrine of non-merger did not apply; and that the lien of the second mortgage was superior to that of the mortgage given by the grantee of the mortgagor.

Vice-Chancellor Reed, of the Court of Chancery of New Jersey, has lately decided a very interesting question in regard to the jurisdiction of equity over the acts of municipal officers. The common council of the borough of Spring Lake, by resolution, threatened to tear down a building that was being erected on land claimed by the borough to have been dedicated to public use. A bill was filed to restrain the borough and its officers. The borough answered, setting up a dedication of the building site, and further filed a cross-bill upon the same ground, praying that the nuisance might be abated. The Vice-Chancellor held, in a carefully considered opinion, that though a court of equity will not, as a general rule, correct irregularities in municipal procedure, it will nevertheless restrain an irregular proceeding if it threatens irreparable injury; that as the charter of the borough prescribed that it should act by ordinance, the action by resolution was irregular; that the injury threatened was irreparable; that the nuisance was not such as a municipal officer could abate at common law, and that the acts threatened could therefore be restrained. But he also held, that as a municipality, as the representative of the public, may sue to abate or prevent a nuisance upon public property within its limits the court would retain the cause upon the allegations of the cross-bill, (no objection to the jurisdiction having been made until the evidence was concluded, and the dedication of the land appearing to be reasonably clear), and would decree an abatement of the nuisance: *Coast Co. v. Mayor, etc., of Borough of Spring Lake*, 36 Atl. Rep. 21.

The Supreme Court of Missouri has lately ruled, that the state board of health has no authority to refuse a certificate authorizing an applicant to practice medicine in the state, on the ground that the medical college from which he had graduated had not complied with a resolution of the board requiring every college, by a certain date, to furnish the board with a list of its matriculates and the basis of their matriculation, when it appears that the applicant

**Physicians,
Refusal of
Board of
Health to
Grant Certificate of Admis-
sion to
Practice,
Mandamus**

was graduated before the college received notice of the resolution; and that, though mandamus will not lie to compel the state board of health to issue a certificate to practice medicine, when they have determined that the applicant is not a graduate from a medical college "in good standing," the decision of that question being within their discretion, yet the question of good standing cannot be made to depend merely on whether the college has complied with a resolution of the board such as mentioned above, the statute giving them no such power; and that a mandamus will accordingly issue in such a case to compel the granting of the certificate: *State v. Lutz*, 38 S. W. Rep. 323.

Though in general the pledgor has an adequate remedy at law for the conversion of a pledge, yet, when the pledgee is insolvent, and the transferee of the pledge lives in another state, a bill in equity will lie at the suit of the pledgor to redeem the pledge: *Nelson v. Owen*, (Supreme Court of Alabama,) 21 So. Rep. 75.

The Supreme Court of the United States has recently held, that a suit in equity against the secretary of the interior to compel him to issue patents to certain lands abates upon his resignation from the office; that when such bill is filed against both the secretary and the commissioner of the general land office, but so far as the latter is concerned only seeks to enjoin the execution of the orders of the secretary relative to the disposition of certain lands, it cannot be maintained against the commissioner alone, after the suit has abated as to the secretary by his resignation; and that in such a case the bill cannot be amended by making the successor of the secretary a defendant: *Warner Valley Stock Co. v. Smith*, 17 Sup. Ct. Rep. 225.

According to a late decision of the Supreme Court of Washington, a city treasurer, who knowingly receives and appropriates to his own use interest on funds of the city deposited in bank, is guilty of a violation of a statute, (Penal Code Wash. § 57,) which makes it a felony for a public officer to use, in

any manner not authorized by law, money entrusted to his safekeeping, in order to make a profit therefrom, or to use the same for any purpose not authorized by law ; the commission of the offence denounced is proved by evidence that interest on the city's deposits in a certain bank was credited to the defendant's individual account, that he drew checks against the interest so credited, which were paid, and that these checks rapidly increased as the interest deposit grew larger ; and that the fact that the defendant does not cause the interest to be credited to his own account, or know that it had been so credited, is immaterial, if he afterwards appropriates the money, knowing that it is interest on the city's funds : *State v. Boggs*, 47 Pac. Rep. 417.

When an apparently helpless person is lying so near to the outer side of a rail as to be exposed to danger from a passing engine, and the engineer, by using ordinary care, could have seen him in time to stop the train, with safety to those on board, before the engine struck him, the company is liable for the injury, notwithstanding the man's contributory negligence ; the duty of the engineer in such a case is the same as if the person endangered had lain between the rails : *Pharr v. Southern Ry. Co.*, (Supreme Court of North Carolina,) 26 S. E. Rep. 149.

**Railroad
Companies,
Negligence,
Injury to
Person on
Track**

Ardemus Stewart.